

Planned Colorado Comments on Title IV NPRM

May 22, 2015

Title IV Part 361

Subpart A General, 361.1 Purpose:

The regulation proposes to replace “gainful employment” with “competitive integrated employment and economic self-sufficiency”.

Comment: The Colorado Division of Vocational Rehabilitation (DVR) applauds the new definition of “competitive integrated employment” and the strengthening of the language concerning compensation, benefits, advancement and the integrated nature of the workplace. DVR is concerned that the proposed regulations do not define “economic self-sufficiency” and as a result, “economic self-sufficiency” could be interpreted as the intention to fully remove individuals with disabilities from public benefits. In reality, many individuals require both competitive earnings and the supports available through public benefits to achieve and maintain their competitive integrated employment outcome. DVR suggests that a definition of “economic self-sufficiency” be added to the regulations and that this definition focus on maximizing a level of economic self-sufficiency which is appropriate for each individual with a disability who receives services under the Vocational Rehabilitation Services Program.

Subpart A Definitions 361.5 (15):

The regulation proposes to change the definition of “employment outcome” in a way that eliminates uncompensated outcomes, including homemakers and unpaid family workers, from the scope of the definition.

The Secretary requests comment on the consideration of a transition period of six months following the effective date of the final regulations.

Comment: Colorado DVR agrees with the removal of uncompensated outcomes from the scope of the definition. However, for a small number of individuals, DVR currently provides homemaker-specific personal adjustment services in-house, or purchases personal adjustment training services from community rehabilitation programs. Historically, the duration of these program-based services is nine months.

If DVR continues to accept individuals into these nine-month programs up to the date of final publication of the regulations, individuals will be unable to complete their programs and achieve successful vocational rehabilitation outcomes. DVR requests the six-month period of transition be extended to either nine or twelve months to allow both individuals with disabilities and Colorado DVR to successfully and fully transition individuals into an employment outcome.

Subpart B 361.18 Comprehensive System of Personnel Development:

The proposed regulation is revised to mirror statute and requires the designated State unit (DSU) to establish and maintain education and experience requirements to ensure personnel have a 21st-century understanding of the labor force and the needs of individuals with disabilities.

Comment: The proposed requirements appear to apply to professionals and paraprofessionals who provide vocational rehabilitation services. Requiring a bachelor's degree for all paraprofessionals, even those for whom there is no national or State-approved requirement, will create an undue hardship for the DSU in being able to hire or maintain the personnel needed to provide vocational rehabilitation services, which are not required to be provided by a qualified rehabilitation counselor (e.g. some assessment services, information and referral, job search assistance, etc.). Colorado DVR utilizes such a paraprofessional position, in which there are currently well-qualified personnel who may lack a baccalaureate degree. Colorado DVR suggests the regulations be written to allow a substitution for years of experience in lieu of the identified degree(s) for paraprofessionals, which will create reasonable flexibility. A requirement of years of experience, along with regulation-required staff development will assure that paraprofessionals are highly qualified to provide appropriate services to individuals with disabilities. In the absence of these changes, greater clarification of the nature of positions for which education requirements apply is requested.

Subpart B 361.20(a)(1) and (a)(2) – Public Participation Requirements:

The proposed regulation clarifies what is meant by a substantive change.

Comment: Colorado DVR appreciates the descriptive examples indicating the distinctions between substantive changes that would require the DSU to conduct a public hearing and administrative changes for which a public hearing need not be conducted.

Subpart B 361.32 Provision of Training and Services to Employers:

The proposed regulation allows the DSU to expend payments to educate and provide services to employers who have hired or are interested in hiring individuals with disabilities under the vocational rehabilitation program.

Comment: Colorado DVR applauds the strengthening of the regulations and the new requirements which support increased work and collaboration with employers. DVR suggests that the activities identified in this section be closely aligned with the WIOA performance measure regarding effectiveness in serving employers. Colorado DVR suggests that all DSUs receive guidance specific to the tracking and recording of data specific to both 361.32 and the measurement of the effectiveness of services to employers.

Subpart B 361.36(a)(3)(v) Ability to Serve all eligible individuals; order of selection for services:

The proposed regulation permits the State vocational rehabilitation program to elect to serve, at its discretion, eligible individuals who require specific services or equipment to maintain employment.

Comment: Colorado DVR appreciates the opportunity that the newly proposed regulation offers for states operating under an order of selection to serve individuals who require services or equipment to maintain employment regardless of their assignment to a priority category. Additionally, DVR applauds the regulation for allowing the DSU the discretion to indicate, in the vocational rehabilitation services portion of the Unified or Combined State Plan, whether the DSU has elected to serve these individuals.

Subpart B 361.40(a) and (b) – Reports; Evaluation Standards and Performance Indicators:

The proposed regulation expands the data that the DSU must report and the frequency with which data must be reported.

Comment: Colorado DVR currently contracts with a vendor to collect, maintain and report the electronic data that is part of DVR’s case management system and that is required for state and federal reporting. DVR believes that the new reporting requirements within the Act and this regulation will create an undue burden on staff at the service delivery level to collect additional federal data and on staff at the administrative level to analyze and report the additional federal data, along with required and ongoing state reporting. DVR is concerned that increased federal reporting requirements and frequency will create a burden on the financial resources of the agency, particularly if the scope of duties of our contracted vendor must be increased and compensated.

Subpart B 361.41(b)(1)(ii) and 361.42– Processing Referrals and Applications and Assessment for Determining Eligibility:

The proposed regulation removes all references to extended evaluation.

Comment: Colorado DVR has two separate concerns relative to this proposed regulation. The first issue pertains to those individuals who may be unable to participate in trial work experiences using realistic work settings. Without the option of extended evaluation for those individuals, DVR is concerned that individuals who might succeed in competitive integrated employment, but for whom realistic work situations cannot be developed, could be inappropriately determined ineligible for services. DVR suggests that assessment information which can be gathered outside of realistic work settings when trial work experiences cannot be developed should be allowed for eligibility determination.

Second, DVR notes that all references to “clear and convincing evidence” have been removed from 361.42, with the exception of the Note to 361.42, where the terminology is defined. DVR requests that an evidentiary standard be addressed, defined and explained in the regulation, particularly as this pertains to the assessment for determining eligibility for vocational rehabilitation services.

Subpart B 361.46(a)(1) – Content of the Individualized Plan for Employment (Mandatory Components):

The proposed regulation requires that the vocational goal selected by the individual be consistent with the general goal of competitive, integrated employment (except that in the

case of an eligible individual who is a student or youth with a disability, the description may be a description of the individual's projected post-school employment outcome).

Comment: Colorado DVR is in absolute agreement with the concept of competitive integrated employment, and with its inclusion in the regulations. However, we are concerned that the outcomes eliminated upon final publication of regulations will result in the diminished capacity of highly qualified professionals to provide necessary services. DVR believes that the uncompensated employment outcomes eliminated by the proposed regulation are valuable for some individuals with disabilities and can be stepping-stones toward competitive integrated employment. Entities such as independent living centers are able to provide quality services leading to those outcomes, however funding for those services has not been increased for those entities, and this is likely to lead to a lesser availability of necessary services for individuals with disabilities.

Additionally, Colorado DVR appreciates the new option for identifying a student's or youth's projected post-school employment outcome on the Individualized Plan for Employment.

Subparts A/B/C 361.29, 361.45, 361.48, 361.49, 361.5(c)(51) and (59) and 361.65 – Transition of Students and Youth with Disabilities:

Comments: Colorado DVR applauds the changes in the regulations which expand the option of planning and providing pre-employment and transition services to youth and students with disabilities. DVR is concerned with the precedent set when a particular segment of the country's population is given preferential funding and service provision, if these activities could, over the long run, have a negative impact on the greater and increasing population of all individuals with disabilities who can benefit from vocational rehabilitation services. In essence, DVR wishes to express our belief that while valuing the needs, contributions and potential long-term successes of young people with disabilities as a result of earlier intervention, youth and students should not receive services at the expense of other unique subsets of the population of individuals with disabilities. DVR is excited to begin serving the expanded population of students and youth, however we anticipate additional burden on current staff and resources as this takes place. Less money will be available for direct service delivery, an expanded continuum of transition services will require increased staff-intensity and positions, and data collection, analysis and reporting will result in additional administrative burden to the agency.

Subpart B 361.48 (b)(6) – Vocational and other training services, including advanced training in a field of science, technology, engineering, or mathematics, medicine, law, or business.

The proposed regulation specifies fields of advanced training.

Comment: Colorado DVR is concerned that the proposed regulation lists some, but not all, fields of advanced study which can result in competitive integrated employment. Federal regulation is intended to direct programmatic activity over the long run, and while science, technology, engineering and mathematics are currently growing fields, there are many other

areas and programs of study which can result in highly successful employment outcomes. DVR believes that listing some fields may prove exclusionary to others, and that the regulation could be misinterpreted as an “all-inclusive” list of approved programs of study. DVR suggests either expanding the list or eliminating it entirely. Additionally, while DVR applauds the increased emphasis on advanced training for individuals with disabilities, the DSU is concerned about the potential future cost burden, given the typically limited number of comparable benefits for advanced education.

Subpart B 361.53(a) and 361.53(d)(1)(3) Comparable Services and Benefits:

The new regulations propose to add language that will require a comparable benefit search for accommodations and auxiliary aids and services, as well as the requirement to address interagency coordination of these services.

Comment: DVR appreciates the new regulatory intent and language, and believes this will clarify and facilitate the coordination of these services between the DSU and other agencies.

Subpart B 361.55 Semi-annual Review of individuals in extended employment and other employment under special certificate provisions of the Fair Labor Standards Act:

This regulation requires review and reevaluation of individuals on an ongoing basis.

Comment: Colorado DVR suggests the addition of regulatory language that allows an individual and his or her individual representative to, as an informed choice, opt out of future reviews after any given review has taken place.

Title IV Part 363

Subpart A 363.11(g)(3)(ii) –Supported Employment:

The proposed regulation directs that extended services may be provided to youth with the most significant disabilities in accordance with an approved IPE for a period not to exceed four years.

Comment: Colorado DVR has several comments specific to the provision of extended services by DVR. First, much of DVR is rural, and sparsely populated. Agency staff currently has difficulty locating ANY supported employment services providers in these parts of the state. Without access to providers, DVR will be unable to meet the requirement to provide extended services. Next, DVR suggests the addition of regulatory language that clarifies the factors that begin and end the four-year period of extended services (and any specific situations which would restart the four-year period). Finally, DVR anticipates significant additional burden in terms of locating providers, creating a payment mechanism for services provided after the DVR case record is closed, collecting and analyzing data, and renegotiating interagency agreements statewide with the many other supported employment providers at the state and local levels.